

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RUSSELL LEBARRON,

Plaintiff(s),

Case No. 2:19-CV-1739 JCM (DJA)

v.
INTERSTATE GROUP, LLC,

Defendant(s).

ORDER

Presently before the court is defendant Interstate Group LLC's ("defendant") motion to dismiss plaintiff Russell LeBarron's ("plaintiff") fourth claim. (ECF No. 41). Plaintiff filed a response (ECF No. 42), to which defendant replied (ECF No. 47).

Also before the court is plaintiff's motion to dismiss defendant's counterclaim. (ECF No. 20). Defendant filed a response (ECF No. 30), to which plaintiff replied (ECF No. 31).

I. Background

The instant action arises from alleged discrimination plaintiff suffered while employed by defendant. (ECF. No 36). Plaintiff was hired on or about May 11, 2012, and maintained his employment through February 15, 2018. *Id.* at 3. On or about January 30, 2018, plaintiff entered a supervised rehabilitation program to undergo treatment for addiction. *Id.* From that date until March 6, 2018, plaintiff continued in his supervised rehabilitation treatment. *Id.* During his treatment, defendant canceled his insurance coverage and terminated his employment. *Id.* Subsequently, plaintiff filed a charge with the EEOC regarding possible retaliation in violation of the ADA. *Id.* at Ex. 1. He later received a notice to sue and timely filed three claims regarding his termination. *Id.* at Ex. 2; (*See also* ECF No, 1). On April 1, 2020, plaintiff amended his complaint. (ECF. No. 36).

1 Plaintiff also brings a fourth claim, alleging that defendant caused him “severe emotional
 2 distress” during his employment by negligently supervising, training, and hiring individuals
 3 “with a propensity towards committing unlawful acts against [p]laintiff.” *Id.* at 8. Plaintiff states
 4 little else in support of this claim beyond a rote recitation that defendant had a duty, breached
 5 that duty, caused injury, and is now liable for damages. *Id.*

6 Defendants now bring a motion to dismiss this fourth claim. (ECF No. 41).
 7 Defendant also brings a counterclaim, which it amended when filing an answer to plaintiff’s
 8 amended complaint, alleging conversion and civil theft against plaintiff. (ECF Nos. 9; 40).
 9 Defendant contends that over the course of his employment, plaintiff stole \$7,014.36 worth of
 10 products and resold those products on various internet sites. (ECF No. 40 at 6.)

11 Plaintiff now moves to dismiss this counterclaim. (ECF No. 20).

12 **II. Legal Standard**

13 A court may dismiss a complaint for “failure to state a claim upon which relief can be
 14 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
 15 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
 16 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
 17 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
 18 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
 19 omitted).

20 “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550
 21 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
 22 matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation
 23 omitted).

24 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
 25 when considering motions to dismiss. First, the court must accept as true all well-pled factual
 26 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
 27 truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by
 28 conclusory statements, do not suffice. *Id.* at 678.

1 Second, the court must consider whether the factual allegations in the complaint allege a
 2 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
 3 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
 4 the alleged misconduct. *Id.* at 678.

5 Where the complaint does not permit the court to infer more than the mere possibility of
 6 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.”
 7 *Id.* (internal quotation marks omitted). When the allegations in a complaint have not crossed the
 8 line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at
 9 570.

10 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
 11 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

12 First, to be entitled to the presumption of truth, allegations in a
 13 complaint or counterclaim may not simply recite the elements of a
 14 cause of action, but must contain sufficient allegations of
 15 underlying facts to give fair notice and to enable the opposing
 16 party to defend itself effectively. Second, the factual allegations
 17 that are taken as true must plausibly suggest an entitlement to
 18 relief, such that it is not unfair to require the opposing party to be
 19 subjected to the expense of discovery and continued litigation.

20 *Id.*

21 **III. Discussion**

22 A. *Defendant's motion to dismiss*

23 Defendant argues that plaintiff's fourth cause of action should be dismissed because it
 24 fails to state a claim upon which relief may be granted. (ECF No. 41 at 1–2). Plaintiff responds
 25 by positing that employment discrimination actions “need only satisfy the simple notice pleading
 26 requirements of the Federal Rules of Civil Procedure and are not subject to a heightened
 27 pleading standard.” (ECF No. 42 at 3).

28 Plaintiff correctly contends that the claim need not meet any heightened pleading
 29 standard. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513–514 (2002). Nevertheless, the claim
 30 must still meet the minimum standard of providing “more than labels and conclusions” or a
 31 “formulaic recitation of the elements of a cause of action.” *Iqbal*, 556 U.S. at 678. If the

1 complaint fails to provide defendant with fair notice of the claim or the grounds upon which it
 2 rests, dismissal is appropriate. *See Twombly*, 550 U.S. at 555.

3 In the instant complaint, plaintiff fails to provide anything more than a recitation of the
 4 elements of negligence. Although plaintiff alleges that defendant had a duty and violated that
 5 duty, he does not provide sufficient factual matter to “state a claim to relief that is plausible on
 6 its face.” *Iqbal*, 556 U.S. at 678 (citation omitted). Plaintiff’s recitation of the elements of
 7 common law negligence does not provide any sort of factual information nudging plaintiff’s
 8 claim from “conceivable to possible.” *Twombly*, 550 U.S. at 570. Indeed, the court cannot
 9 determine whether the claim is grounded in fact at all when the extent of the information
 10 provided is a recitation of the elements of negligence. (ECF No. 36 at 8). Furthermore, there is
 11 no notice of the grounds upon which the claim rests. The complaint, on its face, gives no
 12 indication as to what conduct it challenges, and defendants are left to speculate as to what actions
 13 or omissions plaintiff found objectionable. Thus, the court grants defendant’s motion to dismiss
 14 plaintiff’s fourth claim.¹

15 The court now considers whether to dismiss plaintiff’s claim with or without prejudice.
 16 The Supreme Court has held that “inartfully pleaded” claims should not be dismissed under Rule
 17 12(b)(6) unless “it appears ‘beyond doubt that the plaintiff can prove no set of facts in support of
 18 his claim which would entitle him to relief.’” *Haines v. Kerner*, 404 U.S. 519, 520 (1972).
 19 While plaintiff’s claim is currently insufficient, an amendment could conceivably correct the
 20 deficiencies by providing something more than conclusions of law. Therefore, plaintiff’s claim is
 21 dismissed without prejudice.

22 . . .

23 ¹ While the parties fail to brief the issue, the court notes that plaintiff’s initial charge may
 24 not have been timely filed. Statute requires that an aggrieved party file any discrimination
 25 charge to the EEOC within 180 days of the alleged conduct, or within 300 days if first filed with
 26 a state agency. 42 U.S.C. § 2000e-5(e)(1). Plaintiff’s amended complaint makes no mention of
 27 when or to whom the charge was initially filed outside of a cursory statement that it was timely.
 28 (ECF No. 36 at 2). He does provide the amended charge of discrimination, filed with the EEOC
 on October 10, 2018, but this date falls well outside the statutory limitation for filing first with a
 federal agency. *Id.* While this may present a challenge to jurisdiction, the court declines to
 address the issue *sua sponte*.

1 ***B. Plaintiff's motion to dismiss***

2 Similarly, plaintiff urges the court to dismiss defendant's counterclaim for a failure to
 3 state a claim upon which relief may be granted. (ECF No. 20). Defendant responds by
 4 contending that no technical form is required of a pleading so long as it satisfies Rule 8. (ECF
 5 No. 30 at 2).

6 Amended pleadings supersede the original pleading. *Ferdik v. Bonzelet*, 963 F.2d 1258,
 7 1262 (9th Cir. 1992). Consequently, filing an amended complaint will ordinarily moot a pending
 8 motion to dismiss the original complaint. *See, e.g., MMG Ins. Co. v. Podiatry Ins. Co. of Am.*,
 9 263 F. Supp. 3d 327, 331 (D. Me. 2017) ("Typically, this amendment would render the pending
 10 motion to dismiss moot."); *Oliver v. Alcoa, Inc.*, No. C16-0741JLR, 2016 WL 4734310, at *2
 11 (W.D. Wash. Sept. 12, 2016); *Williamson v. Sacramento Mortgage, Inc.*, No. CIV. S-10-2600
 12 KJM, 2011 WL 4591098, at *1 (E.D. Cal. Sept. 30, 2011), *as amended* (Oct. 11, 2011).

13 However, there is an exception to the general rule. When the amended complaint is
 14 substantially identical to the original complaint, the court can adjudicate the pending motion to
 15 dismiss as it pertains to the amended complaint. *Mata-Cuellar v. Tennessee Dep't of Safety*, No.
 16 3:10-0619, 2010 WL 3122635, at *2 (M.D. Tenn. Aug. 6, 2010). As Judge Woodcock in the
 17 United States District Court for the District of Maine explained:

18 It would be futile to dismiss [defendants'] motion without
 19 prejudice, only to have [defendants] refile another motion to
 20 dismiss with effectively the same arguments. As the later
 21 amendment of the [c]omplaint does not affect the substance of the
 pending motion to dismiss, the [c]ourt considers the [a]mended
 [c]omplaint as the operative complaint for purposes of the motion.

22 *MMG Ins. Co.*, 263 F. Supp. 3d at 331.

23 In the instant case, plaintiff filed an initial complaint, leading to an answer and
 24 counterclaim from defendant. (ECF Nos. 1; 9). Plaintiff then filed a motion to dismiss
 25 defendant's counterclaim. (ECF No. 20). Subsequently, plaintiff also filed an amended
 26 complaint, and defendant responded with an amended answer and counterclaim. (ECF. Nos. 36;
 27 40). Plaintiff filed his motion to dismiss in response to defendant's initial counterclaim, not the
 28 amended counterclaim. (ECF No. 20). Thus, by default, the amended pleading will moot the

1 pending motion unless it is substantially identical to the original pleading. *See, MMG Ins.*, 263
2 F. Supp. 3d at 331; *Mata-Cuellar*, 2010 WL 3122635, at *2.

3 Defendant's amended counterclaim admittedly follows the same general contours as the
4 initial counterclaim. (*Compare* ECF No. 9 at 7–8, *with* ECF No. 40 at 6–7). However, the later
5 amendment to the answer affected the substance of the counterclaim. *Id.* Defendant's amended
6 counterclaim contains several new factual allegations and a new statutory cause of action, both
7 of which go to the heart of plaintiff's motion to dismiss. (*See* ECF Nos. 20; 40). The court
8 denies plaintiff's motion to dismiss as moot and without prejudice to file a new motion to
9 dismiss regarding the amended counterclaim.

10 **IV. Conclusion**

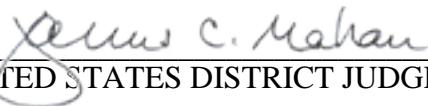
11 Accordingly,

12 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's motion to
13 dismiss (ECF No. 41) be, and the same hereby is, GRANTED.

14 IT IS FURTHER ORDERED that plaintiff's fourth cause of action (ECF No. 36) be, and
15 the same hereby is, DISMISSED without prejudice.

16 IT IS FURTHER ORDERED that plaintiff's motion to dismiss (ECF No. 20) be, and the
17 same hereby is, DENIED as moot.

18 DATED May 22, 2020.

19 
20 UNITED STATES DISTRICT JUDGE